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Issue Date: 16 June 2004

CASE NOs.: 2004-AIR-00016 / 00017

In the Matter of:

CRAIG S. FRIDAY,
Complainant,

vs.

NORTHWEST AIRLINES, INC.,
Respondent.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case arises under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21"). The proceedings before the Office of Administrative Law Judges ("OALJ") were initiated on January 30, 2004, when the Complainant, Craig Friday, requested a hearing before the OALJ on his whistleblowing complaints. This matter is currently set for trial before me in Seattle, Washington, from July 13-15, 2004. Respondent, Northwest Airlines, Inc., filed a Motion for Summary Judgment on April 23, 2004, asking that these matters be dismissed

For the reasons set forth below, the Respondent's Motion for Summary Judgment is GRANTED, and these complaints are DISMISSED.

PROCEDURAL BACKGROUND

AIR 21 gives employees of air carriers protection from retaliation for disclosures the employees make to their employer or to the government concerning "any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety… ." 49 U.S.C. § 42121.

The current proceedings arise from 20 allegations of reprisal by the Respondent for the Complainant's whistleblowing activities the Complainant makes in complaints he filed with the Occupational Safety and Health Administration ("OSHA") on various dates ranging from May 22, 2003, to February 29, 2004. Eighteen of the 20 allegations were dismissed by the OSHA Regional Administrator for a variety of reasons in two separate determinations issued on January

26, 2004, OSHA case numbers 0-1960-03-031 and 0-1960-04-0009. After the dismissal of his complaints, the Complainant filed a request with the OALJ asking for a hearing on his complaints. The OSHA cases were docketed and assigned OALJ case numbers 2004-AIR-00016 and 2004-AIR-00017, respectively, after the OALJ received the Complainant's hearing request. These two cases have been set for hearing before me on July 13-15, 2004.

The remaining two allegations arise from another reprisal complaint the Complainant filed with OSHA on February 29, 2004. OSHA decided that these new allegations were based on the same set of facts raised in the earlier complaints that were already pending before the OALJ for hearing. After making that determination, OSHA referred the two newest allegations to the OALJ with a request that they be consolidated with the complaints already pending before me. I issued an order on April 5, 2004, consolidating the two newest complaints into the cases already pending before me.

On April 23, 2004, the Respondent filed a Motion for Summary Judgment asking that all the complaints be dismissed. The Complainant's response to the Motion for Summary Judgment was received on May 21, 2004. Respondent's reply was received June 1, 2004. This Order will address the Motion for Summary Judgment with respect to each of the Complainant's allegations separately.

FACTUAL BACKGROUND

Northwest Airlines, Inc, is an "air carrier" falling under the provisions of AIR 21. 49 U.S.C. § 42121(a); 29 C.F.R. § 179.101. The Complainant was a pilot who flew for the Respondent. The Respondent and Complainant have a long history of litigation arising from numerous complaints and grievances that the Complainant has filed against the Respondent, and both parties submitted voluminous exhibits in support of their position on this pending motion. Instead of repeating the long history in this case, I will focus on the facts that are necessary to decide the Motion for Summary Judgment.

In an August 17, 1998, letter, the Respondent ordered the Complainant not to enter the Respondent's headquarters under any circumstances. (RX[1] 10, CX 28.) On October 8, 1998, the Respondent notified the Complainant that he was removed from service effective immediately pending the outcome of a medical examination that the Respondent had decided to have under § 15B[2] of the NWA/ALPA Pilots Agreement. The Respondent informed the Complainant that it had reason to believe that he had developed a medical impairment to his ability to perform his piloting duties because of his repeated and unfounded accusations of wrongful conduct against numerous employees and representatives of the Respondent and a report from his captain that the Complainant had committed safety violations during a recent flight. The Complainant was ordered not to contact other personnel with the Respondent, and he was ordered not to enter the Respondent's premises unless cleared by Gene Peterson, the Respondent's Vice President of Flight Operations. He was informed that his examination would be performed by Dr. Garrett O'Connor, a psychiatrist. (RX 13, CX 9.)

[1] References to "RX" are to exhibits included with the Respondent's Motion for Summary Judgment. The exhibits which the Complainant submitted with his opposition to the Motion for Summary Judgment will be referred to as "CX."

[2] The provisions of § 15B are found at RX 2.

Dr. O'Connor examined the Complainant on October 23, 1998. After completing the examination, he prepared a report dated December 2, 1998, in which he diagnosed the Complainant as suffering from a "Cognitive Disorder NOS" which he said met the diagnostic criteria for grounding pending further evaluation. He expressed the opinion that the Complainant was not fit for duty as a commercial pilot at that time. (RX 3.) In an October 8, 1998, letter, the Complainant was notified that he was relieved of duty and placed on extended sick leave pursuant to Section 15B of the NWA/ALPA Pilots Agreement. (RX 13.)

After being relieved of duty, the Complainant filed a lawsuit against the Respondent in Federal District Court for the Western District of Washington. On October 21, 1999, Chief Judge John Coughenour stayed the proceedings while the parties arbitrated grievances that the Complainant had filed under the collective bargaining agreement. At a December 17, 1999, arbitration, while represented by his own attorney[3] and an attorney for the Airline Pilots' Association ("ALPA"), the Complainant agreed, under oath, to voluntarily terminate his employment with the Respondent so that he could qualify for disability retirement. He asserted that he was disabled based on Dr. O'Connor's diagnosis and that he wanted to terminate his employment with the Respondent. He also acknowledged that he understood that termination of employment was defined as a complete severance of his employment relationship with the Respondent and its affiliates. (RX 6.) The Complainant was then placed on disability retirement, where he remains at this time.

As a retired pilot, the Complainant had conditional pass privileges which allowed him to fly on the Respondent's planes. On February 4, 2000, the Complainant sent a letter to President Bill Clinton criticizing the Respondent. (RX 30.) He sent copies of this letter to various news media and other airlines. On February 15, 2000,[4] the Respondent sent the Complainant a letter notifying him that his travel pass privileges were being revoked because of his persistence is pursuing safety complaints that had been established to be unfounded and his defiance of the Respondent's instructions that he refrain from communications with the media about false safety complaints. (RX 17.)

After the arbitration, the stay on the Complainant's Federal complaint was lifted, and the litigation proceeded. The Respondent filed a motion for summary judgment with the District Court, and on November 2, 2002, Judge Coughenour granted the motion for summary judgment. (RX 5.) Judge Coughenour found that the Complainant had voluntarily terminated his employment with the Respondent and rejected the Complainant's allegations of wrongful discharge. He also rejected the Complainant's claims of discrimination under the Americans with Disabilities Act ("ADA"), retaliation under the ADA, discrimination under the Age Discrimination Act, the Complainant's wife's claims of emotional distress, and defamation. (RX 5.) In December 2000, Judge Coughenour ordered the Complainant to pay costs of $57,411 to the Respondent. (RX 48.)

The Complainant appealed the dismissal of his complaint to the Ninth Circuit. On February 20, 2002, the Ninth Circuit affirmed Judge Coughenour's ruling, noting that the Complainant had voluntarily terminated his employment as a pilot with the Respondent after

[3] The Complainant's attorney appeared by phone at the arbitration.

[4] The Respondent's letter is incorrectly dated "January 5, 2000."

stipulating that he was unfit to fly an airplane. (RX 18.) The Ninth Circuit awarded the Respondent $1,287.36 for the costs of the appeal. (RX 48.) Subsequently, on October 14, 2003, Judge Coughenour awarded the Respondents an additional $8,774.81 as post-judgment interest on the previously awarded costs. (RX 48.)

On April 22, 2002, in response to an inquiry from ALPA about the status of the Complainant's pass privileges, the Respondent stated that his travel pass privileges had been revoked in 2000 and that the revocation remained in effect. (RX 11.) On April 30, 2002, the Complainant filed a complaint with OSHA under AIR 21 alleging that his pass privileges had been revoked on April 22, 2002, in retaliation for his planned testimony before Congress. (RX 32, p. 3.)

On November 6, 2002, the Respondent sent the Complainant a letter informing him that it had been advised that he intended to appear as a representative for another individual at an upcoming arbitration and that such an appearance would constitute the unauthorized practice of law. The Respondent informed the Complainant that if he made such an appearance, it would report the Complainant's actions to the county attorney. (RX 20.) After the Complainant responded to the November 6, 2002, letter, the Respondent wrote back on November 12, 2002, stating that if he was only a witness, he would not be engaged in the unauthorized practice of law. In this letter, the Respondent noted that since the Complainant was banned from access to the Respondent's property, they had selected an alternative location for the arbitration hearing. (RX 22, CX 12.) On November 18, 2002, the Complainant filed a complaint with OSHA under AIR 21 alleging that he was banned from the Respondent's property on November 6, 2002 in retaliation for filing his earlier complaint and his association with, and his scheduled appearance at, a union grievance hearing relating to safety issues raised by another Complainant. (RX 33.)

On February 14, 2003, after OSHA completed its investigation into the Complainant's November 18, 2002, complaint, OSHA dismissed his complaint finding that the actions alleged were not "unfavorable personnel actions" because the Complainant was not an employee of the Respondent and that the Complainant had been banned from the Respondent's headquarters on August 17, 1998. OSHA also noted that a threat to report the Complainant for the unauthorized practice of law was not a personnel action. (RX 24.) A short while later, on February 26, 2003, OSHA issued a decision concerning his April 22, 2002, complaint and dismissed that complaint as well because the rescission of his travel pass privilege took place before AIR 21 became law. (RX 23.)

The Complainant appealed the dismissal of both complaints to the OALJ, where it was assigned to Judge Alexander Karst. On March 21, 2003, the Respondent filed a motion for summary judgment asking Judge Karst to dismiss both complaints. On June 27, 2003, Judge Karst granted the motion for summary judgment, finding that the complaint concerning the Complainant's travel pass privileges was untimely filed because the Complainant's pass privileges were revoked in 2000, that the threat to report the Complainant for the unauthorized practice of law was not an adverse personnel action because it was not related to the employment relationship between the Respondent, and that the Complainant's ban from the Respondent's property after he agreed to his termination was not an adverse personnel action covered by AIR 21. (RX 34, CX 19.)

The Complainant subsequently filed additional complaints with OSHA alleging reprisal for whistleblowing which are the subject of this proceeding.

COMPLAINANT'S ALLEGATIONS

Because of the number of allegations involved in the Complainant's various complaints, the Administrator assigned individual numbers to each allegation in his complaints and discussed each one separately. Respondent continued that practice by numbering each of his allegations, and the Complainant adopted the same numbering. To facilitate discussion of these allegations, I am also assigning a unique number to each allegation and will discuss them by allegation number. The allegations[5] are as follows:

1. Respondent made false statements on December 12, 2002, by saying it terminated the Complainant and that there was no employment relationship.
2. Respondent made false and slanderous statements about the Complainant in April, May, and June 2003, to a federal arbitrator. Respondent made false and slanderous statements about the Complainant at a hearing before an Administrative Law Judge on August 26, 2003.
3. Respondent referred to the Complainant's safety concerns about weight and balance as a "fantasy" and a product of the Complainant's "mental" condition in documents to federal agencies on March 31, 2003.
4. Respondent's actions in allegation 3 blackballs the Complainant from employment with any other airline carrier and violates the Pilot Contract and Minnesota statutes.
5. Respondent threatened the Complainant with imprisonment on November 6, 2002.
6. Respondent banned the Complainant from the Respondent's property in November 2002.
7. Respondent refused to rehire the Complainant on July 20, 2003, when he asked to be put back in active flight status under the Pilot Contract.
8. Respondent removed the Complainant's travel pass privileges in April 2003.
9. Respondent refused to accept the Complainant's union grievance on March 25, 2003.
10. Respondent revoked the Complainant's jump seat privileges in January 1999.
11. Respondent slandered the Complainant's reputation by posting a FIF in January 1999.
12. Respondent slandered the Complainant's reputation by submitting a copy of a summary judgment with false information on March 31, 2003, and during an ALJ hearing.
13. Respondent slandered his financial reputation by filing false judgments against the Complainant's property in Oregon and British Columbia in Spring 2003.
14. On April 15, 2003, the Respondent refused to allow the Complainant to contact anyone at the Respondent's place of business and required all contacts to go through Respondent's lawyers.
15. Respondent made numerous false statements about the Complainant.

[5] The description of these allegations are drawn from the District Director's determinations.

16. Respondent threatened the Complainant with arrest or termination if the Respondent believes the Complainant has violated the terms of a confidentiality "gag" order relating to safety concerns.
17. In March 2003, Respondent disallowed the Complainant from using his travel passes.
18. Recently, Respondent refused to allow the Complainant to ride in the jump seat.
19. Respondent refused to allow the Complainant to file a grievance in March 2003.
20. Respondent told him in January 2004 that it was not allowing him to submit a grievance he filed back in December 2003.

Allegations 1 through 13, from OWCP case number 0-1960-03-031, were incorporated into OALJ case number 2004-AIR-0016 ("AIR 16 case"), allegations 14 through 18, from OWCP case number 0-1960-04-009, were incorporated in to OALJ case number 2004-AIR-00017 ("AIR 17 case"), and the last two allegations were those received by OWCP in February 29, 2004.

DISCUSSION

Applicable Law

A party is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c); *see also* 29 C.F.R. § 18.40(d). The moving party bears the initial burden of showing the absence of a genuine issue as to any fact which may affect the outcome of the litigation. *Commodity Futures Trading Commission v. Savage,* 611 F.2d 270 (9th Cir. 1979). Once this burden has been met, the "adverse party" must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 447 U.S. 242, 250 (1986). In doing so, "a party opposing the motion may not rest upon the mere allegations or denials [in its] pleading." 29 C.F.R. § 18.40(c).

AIR 21 requires that "[a] person who believes that he or she has been discharged or otherwise discriminated against, … may not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination… ." 41 U.S.C. § 42121(b)(1). It is generally accepted that the period for filing employment discrimination and retaliation complaints begins on the date the employee is given definite notice of the challenged employer decision. *See, Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498 (1980); *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988); *Howard v. Tennessee Valley Authority,* 90ERA-24 (Sec'y July 3, 1991).

The Complainant's Employment Status with the Respondent

Several of the Complainant's allegations are based on an assertion that he was an employee of the Respondent at the time of the various alleged retaliatory actions. Those allegations turn on the Complainant's employment status and were rejected by the Administrator

because the Complainant did not have an employer/employee relationship with the Respondent at the time of the alleged retaliatory action.

The Complainant asserts that he has been a continuous employee of the Respondent for 26 years and that in 1999 he merely "moved from active duty as a line pilot onto temporary disability." He argues that while on disability retirement, he has retained his seniority and has a 7 year period of time during which he can return to flying. In support of his claim, he points out that he was listed on a January 2004 Seniority List, CX 1, and that the Respondent's Pilot Position Report, CX 3, shows him as a pilot based in Anchorage effective July 2004.

The Complainant is an "employee" for the purposes of AIR 21, which defines an employee as "an individual presently or formerly working for an air carrier… ." 29 C.F.R. § 1979.101. However, the evidence does not support the Complainant's claim that he retains a current employment status with the Respondent or that he was an employee at the time of the various alleged retaliatory actions. The Respondent asserts that the Respondent's Pension Plan for Pilot Employees specifically states that disability retirement, which the Complainant is currently receiving, is only available upon termination of employment from the Respondent, and "termination of employment" is defined in the Pension Plan as a complete severance of an employee's employment relationship with the Respondent. It argues that because of these provisions, the Complainant elected to terminate his employment with the Respondent during the arbitration hearing so that he could receive disability retirements. Judge Coughenour, Judge Karst, and even the Ninth Circuit Court of Appeals have found that the Complainant voluntarily terminated his employment with the Respondent while under oath at his arbitration hearing on December 17, 1999. By presenting his argument that he is still employed, the Respondent refuses to accept the decision by Judge Coughenour, which was affirmed by the Ninth Circuit, and the decision by Judge Karst that he is no longer an employee of the Respondent's. The Complainant is bound by the earlier determinations, and even if he were not, there is no basis for disturbing the earlier findings.

The Complainant argues that he has been included in the Respondent's January 2004 seniority list, CX 1, and argues that it supports his claim that he remains an employee because Section 22 of the collective bargaining agreement states that all pilots having "an employee-employer relationship with the Company" shall be shown on the list. The Complainant provided a copy of § 22A.4, CX 2, to corroborate his claim. The Complainant, however, ignored, and failed to submit the complete text of § 22. Section 22.D.3, RX 35, specifically says that a pilot receiving a disability retirement pension under the Pilots' Pension Plan, such as the Complainant, is to retain and continue to accrue seniority for a period of 7 years from the date of his disability retirement date. His inclusion on the seniority list does not establish that he remains an employee; it merely establishes that he continues to accrue seniority because he is receiving a disability pension.

Thus, I find the Complainant terminated his employment relationship with the Respondent on December 17, 1999, and ceased to be an employee after that date.

Covered Personnel Actions

Since the Complainant was not a current employee of the Respondent's at the time of many of the various alleged retaliatory actions, the scope of the personnel actions prohibited by AIR 21 is more limited. The general rule, applied in other whistleblower and retaliation contexts is that complainants who are former employees are subject to unfavorable personnel actions when the alleged retaliatory act is related to or arises out of the employment relationship in some way. *Charlton v. Paramus Board of Education*, 25 F.3d 194, 198-200 (3rd Cir. 1994) (Title VII anti-retaliation provision); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977) (anti-retaliation provisions of the Fair Labor Standards Act); *Delcore v. Northeast Utilities*, 90-ERA-37 (Sec'y Mar. 24, 1995) (whistleblower protections of the Energy Reorganization Act).

As a former employee who is on disability retirement, only those actions by the Respondent which affect the benefits the Complainant is entitled to as a former employee, his possible re-employment, or his ability to seek other employment (such as a blacklisting claim), are covered as a personnel action under AIR 21. This includes those rights under the Pilots' Pension Plan provided to pilots whose services with the Respondent have been severed but who are receiving a disability retirement pension under the Pilots' Pension Plan. (RX 35.)

Discussion of Allegations

Allegation 1 - Respondent made false statements on December 12, 2002, by saying it terminated the Complainant and that there was no employment relationship

The Regional Administrator ruled that this allegation was filed May 22, 2003, and dismissed this complaint as being untimely.

Respondent presents a number of arguments in support of its request to dismiss this allegation. It argues that, as the Administrator found in his decision, this allegation was untimely and time-barred and "slander" is not an unfavorable personnel action covered by AIR 21. It also argues that the statements in question are true and that two prior summary judgments, one by Judge Coughenour and one by Judge Karst, have ruled that there was no employer/employee relationship between the Respondent and the Complainant after he terminated his employment on December 17, 1999.

In response, the Complainant first asserts that this allegation was filed on January 10, 2003, when it was received by OSHA, not on May 22, 2003. He then argues that it was timely filed because it was filed within 28 days after he received a December 12, 2002, letter from Respondent's attorney stating that he has no employment relationship with the Respondent. He alleges that the claim of "no employment relationship" was a new claim being made by the Respondent.

The statement made in Respondent's December 12, 2002, letter to the Complainant, CX 6, even if untrue, does not constitute a personnel action covered by AIR 21. However, the facts establish that the statement is true. The Complainant had no current employment relationship with the Respondent on December 12, 2002. As discussed above, and as found by Judges Karst and Coughenour and the Ninth Circuit, the Complainant's employment relationship ended on

December 17, 1999, when he terminated it at the arbitration hearing. More importantly, this allegation does not constitute a personnel action covered by AIR 21. Accordingly, this allegation is DISMISSED.

Allegation 2 - Respondent made false and slanderous statements about the Complainant in April, May, and June 2003, to a federal arbitrator. Respondent made false and slanderous statements about the Complainant at a hearing before an Administrative Law Judge on August 26, 2003

The Regional Administrator found that the allegation concerning the federal arbitrator was untimely, though the allegation concerning the ALJ hearing was timely. However, he determined that this allegation did not allege a personnel action that is covered by AIR 21.

Again, Respondent argues that "slander" is not an adverse personnel action covered by AIR 21. It also argues that since the objectionable statements were made in the course of litigation, there is an absolute defense to defamation claims and that the arbitrator and Judge Avery, who presided at the arbitration and OALJ hearing, expressed no problem with Respondent's conduct at the proceedings they conducted.

The Complainant denies that the complaint that includes this allegation was filed on October 22, 2003, alleging that it was filed on May 29, 2003, and merely amended in October 2003. He points out that John Henshaw, who investigated the complaint, found it was filed in May 2003 and amended on October 28, 2003. (CX 8.)

There is no need to address the timeliness aspect of this allegation, as I agree with the Regional Administrator's determination that the allegedly slanderous statements do not constitute a prohibited personnel action. Accordingly, this allegation is DISMISSED.

Allegation 3 - Respondent referred to the Complainant's safety concerns about weight and balance as a "fantasy" and a product of the Complainant's "mental" condition in documents to federal agencies on March 31, 2003

The Regional Administrator found that this allegation was untimely filed and also did not allege a personnel action covered by AIR 21.

Respondent argues that this allegation is untimely and that the statements were true. It also argues that this allegation is too vague to present a *prima facie* case because the Complainant failed to identify the federal agencies involved.

The Complainant again denies that the complaint that includes this allegation was filed on October 22, 2003, alleging that it was filed on May 29, 2003, and merely amended in October 2003. He points out that John Henshaw, who investigated the complaint, found it was filed in May 2003 and amended on October 28, 2003. (CX 8.)

Again, there is no need to address the timeliness aspect of this allegation, as I agree with the Regional Administrator's determination that the allegedly slanderous statements do not constitute a prohibited personnel action. Accordingly, this allegation is DISMISSED.

Allegation 4 - Respondent's actions in allegation 3 blackballs the Complainant from employment with any other airline carrier and violates the Pilot Contract and Minnesota statutes

The Regional Administrator dismissed this complaint it was because it was untimely filed and did not allege a personnel action. He also stated that the U.S. Department of Labor has no authority to enforce the Pilot Contract or Minnesota statutes.

Respondent argues that the Complainant's diagnosed mental condition, which resulted in his removal from the cockpit is an absolute defense to the slander allegations. It also argues that since the Respondent lacks a first class medical certificate, he is not authorized to fly for any certified air carrier. It further argues that in the absence of an allegation that the Complainant has applied for other jobs and has actually been denied employment as a result of anything the Respondent said or did, another airline's decision not to hire the Complainant could not be the product of retaliation by the Respondent. It also stresses that it has repeatedly informed the Complainant that he can return to active duty if his mental condition ameliorates, but he has taken no steps to treat or heal his condition. It further argues that the Department of Labor has no authority to enforce the Pilots Reporting Act, the alleged state statutes that were violated or the collective bargaining agreement.

The Complainant offered no response to the Respondent's arguments regarding this allegation.

The Complainant has failed to assert sufficient facts to establish a valid claim with respect to this allegation. As the Respondent points out, he has failed to allege any facts that to support a claim of "blackballing," and since he has admitted that he does not possess a first class medical certificate, employment by another employer as an airline pilot is out of the question. This allegation is DISMISSED.

Allegation 5 - Respondent threatened the Complainant with imprisonment on November 6, 2002

The Regional Administrator found that this allegation was part of a complaint that was filed on November 18, 2002, and dismissed on February 14, 2003. He dismissed this allegation as untimely.

The Respondent points out that it merely warned the Complainant of the potential civil and criminal penalties for impersonating an attorney and argues that Judge Karst has already granted summary judgment on this claim. It also argues that this allegation is untimely.

The Complainant alleges that this complaint was timely filed on January 10, 2003, because he was informed on November 6, 2002, that if he attempted to appear as a representative for John Robinson, Respondent would have him arrested for the unlawful practice of law. (CX 10.)

This allegation arises from the November 6, 2002, letter that the Respondent's counsel sent to the Complainant warning him of the consequences of engaging in the unauthorized practice of law. Again, there is no need to address the dispute over the timeliness of this allegation since even if it was timely, the action complained of does not constitute a personnel action. Judge Karst addressed this exact same allegation in his ruling on the earlier motion for

summary judgment. The documentary evidence shows that the Respondent was merely warning the Complainant of the potential consequences if he engaged in what the Respondent asserted might be the unauthorized practice of law. This warning, which the Complainant alleges was a threat, is not a personnel action. This allegation is DISMISSED.

Allegation 6 - Respondent banned the Complainant from the Respondent's property in November 2002

The Regional Administrator found that this allegation was part of a complaint that was filed on November 18, 2002, and dismissed on February 14, 2003. He dismissed this allegation as untimely.

The Respondent argues that this allegation is untimely and was resolved earlier on summary judgment. It also notes that the Complainant has inaccurately identified the date of the action.

The Complainant alleges that this complaint was timely filed on January 10, 2003, because he was informed on November 12, 2002, that he had been banned from access to the Respondent's property. He asserts that on August 17, 1998, he was only barred from the Respondent's headquarters building, not from all of its property. (CX 28.)

This allegation was based on the same action that the Complainant complained of earlier that was addressed by Judge Karst. (RX 33, 34.) The November 12, 2002, letter, RX 22, merely reminded the Complainant of his earlier ban from the Respondent's property. It did not impose a new ban. This allegation has been previously addressed. This allegation is DISMISSED.

Allegation 7 - Respondent refused to rehire the Complainant on July 20, 2003, when he asked to be put back in active flight status under the Pilot Contract

The Regional Administrator found this complaint was timely filed but that the Complainant had failed to make a *prima facie* showing because he failed to show that he had valid FAA medical certificate which is a priority to working as a pilot.

The Respondent argues that the Complainant cannot be rehired as a pilot until his mental condition is fully resolved and he secures a first class medical certificate, pointing out that the FAA states that his certificate expired in all classes some time ago. (RX 39), 14 C.F.R. § 61.53.

The Complainant did not respond to the Respondent's arguments regarding this allegation, but he admitted during a telephone conference call conducted on April 28, 2004, with counsel for both parties that he did not have a first class medical certificate and that such a certificate was a pre-requisite to being rehired as a pilot.

The Complainant apparently asked to be reinstated to flight status on or about July 20, 2003. On July 31, 2003, the Respondent sent the Complainant a letter informing him that he could not be reinstated to flight status until it had evidence that he held a FAA medical certificate and after it determined that he was fit to resume his duties. (RX 38.) On August 6, 2003, the FAA informed the Respondent's counsel that the Complainant's medical certification had expired in all classes. (RX 39.) As a former employee, the Respondent's refusal to rehire the

Complainant is a prohibited personnel action if it was in reprisal for his prior whistleblowing activities. *See Flanagan v. Bechtel Power Corp.,* 81-ERA-7 (Sec'y June 27, 1986) (anti-retaliation provisions of Energy Reorganization Act apply to former employee who seeks reemployment); *Chase v. Buncombe County, N.C.,* 85-SWD-4 (Sec'y Nov. 3, 1986) (anti-retaliation provisions of Solid Waste Disposal Act apply to former employee who seeks reemployment).

However, in view of the undisputed fact that the Complainant did not have a first class medical certificate at the time he asked to be reinstated to flight status and the undisputed fact that a first class medical certificate is a pre-requisite to being an active pilot, Respondent's refusal to grant the Complainant's request was a proper one. This allegation is DISMISSED.

Allegation 8 - Respondent Removed the Complainant's travel pass privileges in April 2003

The Regional Administrator found this complaint was untimely. He also found that it was part of a April 30, 2002, complaint that was dismissed on February 26, 2003, and appealed to the OALJ and dismissed by Judge Karst.

The Respondent argues that this allegation is untimely and was decided in federal court and by Judge Karst's rulings on its earlier summary judgment motions.

The Complainant denies that Judge Karst dismissed this allegation, claiming that the Respondent had not actually taken away his pass benefits and that Judge Karst held that if the pass privileges had not been taken away, then there was no unfavorable personnel action. He asserts that he sought the pass privileges in April 2003 because he understood from Judge Karst's decision that his pass privileges had not been taken away, and his request was timely. He then filed the complaint on May 29, 2003, alleging that his privileges had been taken away.

The Complainant has failed to correctly read Judge Karst's decision. Judge Karst rejected this claim as being untimely when it was presented to him. Judge Karst specifically found that "no reasonable fact-finder could decide Friday's travel pass [privileges] were terminated after June 15, 2000", and found the allegation to be untimely when it was raised on April 30, 2002. Respondent's exhibit 17 establishes that the Complainant's travel pass privileges were taken away January 15, 2000. The confirmation that they were taken away does not constitute a new revocation of that privilege. This allegation is DISMISSED.

Allegation 9 - Respondent refused to accept the Complainant's union grievance on March 25, 2003

The Regional Administrator found this complaint untimely and concluded that the Complainant failed to show he was treated differently from other retired pilots.

The Respondent argues that under the collective bargaining agreement the Complainant's right to file new grievances ended with his termination. It argues that § 15B of the collective bargaining agreement, RX 2, provides that the grievance process is only for pilots covered by the collective bargaining agreement, and that as a disability-retired employee, he is covered by the Pension Plan, not the Pilots Agreement. The Respondent also argues that its refusal to accept the grievance is not an action covered by AIR 21. It further argues that this allegation is untimely.

The Complainant asserts that he has a contractual right as an employee to file a grievance and alleges that ALPA has confirmed a retired pilot's right to handle his own grievance with the Respondent. (CX 17.) He also cites to § 20 of the collective bargaining agreement, CX 14, which allows any pilot covered by the agreement to file a grievance, as well as an 11th Circuit decision in *Pyles v. United Air Lines, Inc.*, 79 F.3d 1046 (1996), which stated that "an individual airline pilot employee has a statutory right under the RLA to convene a special board of adjustment without his union's involvement." He also asserts that this allegation was part of a complaint that was timely filed because his grievance was denied on March 25, 2003, and he filed his complaint on May 29, 2003, with a formal complaint drawn up on July 8, 2003. He argues he should not be penalized because OSHA delayed preparing his formal complaint.

Contrary to the Respondent's argument, § 15B, RX 2, does not state that that a disability retired pilot is not covered by the collective bargaining agreement. However, it makes sense that rights under a collective bargaining agreement between an employer and its employees are only available as long as there is an employer-employee relationship between the two parties. Since the Complainant terminated his employment with the Respondent on December 17, 1999, he logically has no rights under the collective bargaining agreement with ALPA to file any grievances. This allegation is DISMISSED.

Allegation 10 - Respondent revoked the Complainant's jump seat privileges in January 1999

The Regional Administrator found this allegation was untimely filed and related to an action that was taken before AIR 21 was passed.

The Respondent argues that this allegation is untimely.

The Complainant did not respond to the Respondent's arguments relating to this allegation. This allegation is clearly untimely and is DISMISSED.

Allegation 11 - Respondent slandered the Complainant's reputation by posting a FIF in January 1999

The Regional Administrator found this allegation was untimely filed and related to an action that was taken before AIR 21 was passed.

The Respondent argues that this allegation is untimely filed and that slander is not an adverse personnel action covered by AIR 21.

The Complainant did not respond to the Respondent's arguments relating to this allegation. Again, this allegation is untimely on its face, and, as with the other alleged slander allegations, it is not a personnel action. Thus, this allegation is DISMISSED.

Allegation 12 - Respondent slandered the Complainant's reputation by submitting a copy of a summary judgment with false information on March 31, 2003, and during an ALJ hearing

The Regional Administrator found that the allegation concerning the submission on March 31, 2003, was untimely filed, but that the allegation concerning the submission in the ALJ

hearing was timely. However, he concluded that neither action was a personnel action covered by AIR 21 and dismissed the allegation.

The Respondent again argues that this allegation is untimely filed, that slander is not an adverse personnel action covered by AIR 21 and additionally argues that the alleged slanderous statements were in a summary judgment order issued by Judge Coughenour, not the Respondent.

The Complainant did not respond to the Respondent's allegations concerning this allegation.

Again, there is no need to address the timeliness issue because the action involved is not a personnel action. I also note that there is no slander involved since, as the Respondent's point out, the document in question was not produced by them, and it was a judicial decision and order. This allegation is DISMISSED.

Allegation 13 - Respondent slandered his financial reputation by filing false judgments against the Complainant's property in Oregon and British Columbia in Spring 2003

The Regional Administrator found this allegation was untimely filed and was not a personnel action covered by AIR 21 and dismissed the allegation.

The Respondent argues that collection of a debt found to be judicially owing cannot be slander and that it has a right to collect the judgment it has against the Complainant. It further argues that this allegation is untimely.

The Complainant did not respond to the Respondent's arguments concerning this allegation.

The judgment in question, RX 48, is a judgment in favor of the Respondent for the costs involved in the Complainant's Federal district court action against the Respondent which was dismissed on a summary judgment motion. Presentation of that document as part of a collection proceeding is not slander, nor is it a personnel action covered by AIR 21. This allegation is DISMISSED.

Allegation 14 - On April 15, 2003, the Respondent refused to allow the Complainant to contact anyone at the Respondent's place of business and required all contacts to go through Respondent's lawyers

The Regional Administrator found this allegation was untimely filed and was not a personnel action covered by AIR 21 and dismissed the allegation.

The Respondent argues that this allegation is virtually identical to the property ban complaint that the Ninth Circuit and Judges Karst and Coughenour rejected in the earlier proceedings and barred by *res judicata*. It further argues that this allegation is untimely and is not an adverse personnel action covered by AIR 21.

The Complainant did not respond to the Respondent's arguments concerning this allegation.

The Complainant's allegation concerning bar from the Respondent's property was more than adequately addressed by Judge Karst and rejected. (RX 34.) There is no need to address it any further. This allegation is DISMISSED.

Allegation 15 - Respondent made numerous false statements about the Complainant

The Regional Administrator found that this was a repeat of an earlier allegation and, thus, untimely. He also found that *res judicata* applied to this allegation, and that it was not a personnel action covered by AIR 21.

The Respondent argues that this nonspecific allegation does not come close to a *prima facie* complaint since the allegation fails to identify the statements, when they were made, the context in which they were made, how they were false, or how they affect his alleged employment. It further argues that this is, again, not a personnel action under AIR 21. It also argues that this allegation is barred by *res judicata*.

The Complainant did not respond to the Respondent's arguments concerning this allegation.

This allegation is a more generic version of Allegations 1, 2, 11, 12, and 13 which have already been rejected. As Respondent points out, it lacks any specificity, and these allegedly false statements do not constitute a personnel action covered by AIR 21. This allegation is DISMISSED.

Allegation 16 - Respondent threatened the Complainant with arrest or termination if the Respondent believes the Complainant has violated the terms of a confidentiality "gag" order relating to safety concerns

The Regional Administrator found that no dates were provided to establish timeliness but also concluded that it did not allege a personnel action covered by AIR 21.

The Respondent argues that this allegation fails to provide sufficient information since it does not identify specific threats, dates, persons making the alleged threats, or how the threats could affect the terms and conditions of his alleged employment. The Respondent also asserts that the alleged conduct is not a personnel action covered by AIR 21.

The Complainant did not respond to the Respondent's arguments concerning this allegation.

Again, this allegation lacks specificity, but more importantly, it does not allege a personnel action covered by AIR 21. This allegation is DISMISSED.

Allegation 17 - In March 2003, Respondent disallowed the Complainant from using his travel passes

The Regional Administrator found this allegation was untimely filed.

The Respondent argues that this allegation is untimely. It also points out that it is barred by *res judicata* since it was previously and specifically rejected by both Judge Karst and Judge Coughenour. The Respondent also points out that this allegation is virtually identical to allegation 8.

The Complainant did not respond to the Respondent's arguments concerning this allegation.

As discussed earlier in the discussion about Allegation 8, the Complainant's travel pass privileges were revoked January 15, 2000, and this allegation was rejected by Judges Karst and Coughenour. This allegation is untimely and DISMISSED.

Allegation 18 - Recently, Respondent refused to allow the Complainant to ride in the jump seat

The Regional Administrator found that this was a repeat of an earlier allegation and, thus, untimely. He also found that *res judicata* applied to this allegation, and dismissed it.

The Respondent points out that this allegation fails to specify a specific date and is essentially identical to Allegation 10 which the Complainant states took place five years ago. The Respondent also points out that jump seat privileges are only available to those who have the capacity to assist in an in-flight emergency, which excludes the Complainant since he is a mentally impaired former pilot. The Respondent asserts that this is another allegation that is barred by *res judicata*.

The Complainant did not respond to the Respondent's arguments concerning this allegation.

The Complainant's jump seat privileges were revoked in January 1999. The fact that he made a recent request to ride in the jump seat which was denied does not create a new appealable personnel action. This allegation is untimely, and it is DISMISSED.

Allegation 19 - Respondent refused to allow the Complainant to file a grievance in March 2003 and Allegation 20 - Respondent told him in January 2004 that it was not allowing him to submit a grievance he filed back in December 2003

The Regional Administrator found that these allegations were based on the same facts alleged in the allegations above and referred them to the OALJ for consolidation on March 10, 2004, without making a specific determination.

The Respondent notes that these allegation are a regurgitation of Allegation 9 and should be rejected for the same reasons.

The Complainant did not respond to the Respondent's arguments concerning these allegations.

As discussed in conjunction with Allegation 9, the Complainant had no right to file a grievance under the ALPA collective bargaining agreement because he was no longer an employee of the Respondent's. Thus, Allegations 19 and 20 are DISMISSED.

CONCLUSION

In conclusion, there is no dispute as to the material facts in this case. The Complainant's numerous allegations of reprisal were either reiteration of earlier allegations that were rejected before, were untimely, or did not allege actions which constitute personnel actions covered by AIR 21. The Complainant's pursuit of many of these allegations is due to the fact that the Complainant refuses to accept the fact that he voluntarily severed his employment with the Respondent in December 1999 and his refusal to accept the fact that reiteration of actions taken before by the Respondent, such as the ban from the Respondent's property and the revocation of his jump seat and travel pass privileges, does not constitute new revocations.

His failure to accept these facts, as well as the earlier decisions by Judge Karst, Judge Coughenour, and the Ninth Circuit with regard to some of these claims which he has attempted to pursue in this proceeding before me, has caused the Respondent to expend unnecessary resources responding to his allegations. This unnecessary expenditure of resources in responding to the Complainant's latest allegations must end.

In view of the lack of dispute as to material facts, the fact that the Complainant's allegations, as discussed above, were previously decided, untimely, or did not allege a personnel action covered by AIR 21, there is no point in allowing these matters to proceed to trial.

ORDER

Accordingly, the Respondent's Motion for Summary Judgment is GRANTED. It is hereby ORDERED that these complaints be DISMISSED. It is hereby ORDERED that the hearing scheduled for July 13-15, 2004, in Seattle, Washington, be VACATED.

A

JENNIFER GEE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).